

# Wisconsin's Chief Legislator: The Governor's Partial Veto Authority and the New Tipping Point

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# **WISCONSIN'S CHIEF LEGISLATOR: THE GOVERNOR'S PARTIAL VETO AUTHORITY AND THE NEW TIPPING POINT**

## **I. INTRODUCTION**

Failing to gain legislative approval for his bold education spending proposal during construction of the 2005–2007 biennial state budget, Wisconsin Governor Jim Doyle unilaterally increased the public school aid appropriation included in the legislature-passed budget bill.<sup>2</sup> Specifically, Governor Doyle used the full extent of his partial veto authority to pull together a series of words, digits, and punctuation marks from multiple sections of the budget bill that added \$330 million to state public school aid for fiscal years 2005 and 2006.<sup>3</sup> In the same budget bill, Governor Doyle's creative vetoes arguably granted the state secretary of administration unlimited authority to shift appropriation amounts between accounts.<sup>4</sup> The legislature was unable to gather the supermajority required to override the governor's partial vetoes, and the 2005–2007 budget bill, as altered by the governor, became law.<sup>5</sup>

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1. Patrick J. Lucey, *The Partial Veto in the Lucey Administration*, 77 MARQ. L. REV. 427, 430 (1994). Governor Lucey states his belief that state governors and the President of the United States act as "Chief Legislators," similar to the prime minister in a parliamentary system of government. *Id.*

2. See 2005–2007 Biennial State Budget, Act 25, § 9155, 2005 Wis. Sess. Laws 1, 378–82; Assemb. Journal, 97th Leg., Reg. Sess. 386 (Wis. 2005) (governor's veto message).

3. See Act 25, § 9155, 2005 Wis. Sess. Laws at 378–82; Assemb. Journal, 97th Leg. Reg. Sess. at 386; Steven Walters et al., *Governor Uses 139 Vetoes to Transform School Budget*, MILWAUKEE J. SENTINEL, July 26, 2005, at 1A. The fiscal year begins on July 1 and ends June 30. WIS. LEGISLATIVE COUNCIL, *State Budget Process*, in WISCONSIN LEGISLATOR BRIEFING BOOK 2005–2006, AT 5 (2004). The Wisconsin budget process covers two fiscal years at a time—a biennium. The biennial budget starts on July 1 of each odd-numbered year and runs through June 30 of the next odd-numbered year. *Id.*

4. See Act 25, § 9255, 2005 Wis. Sess. Laws at 385; Letter from Alan J. Lasee, Wis. Senate President, to Peggy A. Lautenschlager, Wis. Attorney Gen. (July 29, 2005) [hereinafter Letter from Sen. Lasee to Attorney General] (requesting the attorney general's opinion regarding the legality of Governor Doyle's vetoes to Act 25, section 9255, of 2005 Wisconsin Session Laws) (on file with author).

5. Steven Walters & Stacy Forster, *Senate Falls Short on Veto Override*, MILWAUKEE J. SENTINEL, Sept. 28, 2005, at 3B.

Governor Doyle's 139 partial vetoes to the 2005–2007 biennial budget bill passed by the legislature,<sup>6</sup> including Governor Doyle's increase in education funds and grant of appropriation authority to a cabinet secretary, reenergized debate over the extensive partial veto powers entrusted to Wisconsin's governor and prompted legislators to introduce constitutional amendments to limit those powers.<sup>7</sup> The number of partial vetoes applied to the 2005–2007 budget bill is high, but it is far from unprecedented when compared to use of the partial veto power by past governors.<sup>8</sup> However, Governor Doyle expanded on partial veto precedents, redefining the governor's ability to manipulate appropriation measures and reducing the legislature's control over state spending.

The partial veto authority granted to the Wisconsin governor through article V, section 10 of the Wisconsin Constitution,<sup>9</sup> as interpreted by the Wisconsin Supreme Court, is considered by many to be the most expansive veto authority in the country.<sup>10</sup> Through creative deletions (and additions) to legislature-passed appropriation measures, Wisconsin governors have repeatedly disregarded perceived restraints on the partial veto authority.<sup>11</sup> The Wisconsin governor's expansive veto power stems from the Wisconsin Supreme Court's determination that the governor's legislative authority is "coextensive" with that of the legislature, and that any partial veto of an appropriation bill is valid so

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6. Assemb. Journal, 97th Leg., Reg. Sess. at 375. The number of partial vetoes applied to a budget bill is noted by the governor in the "governor's veto message," which is sent to the legislative chamber in which the bill originated. WIS. CONST. art. V, § 10. Separate portions of text included in the enrolled bill that are vetoed by the governor are marked and separately labeled by the governor as "Vetoed In Part." For an example of the marking and labeling of partial vetoes, see 2005–2007 Biennial State Budget, Act 25, 2005 Wis. Sess. Laws 1. In the 2005–2007 budget bill, Governor Doyle's vetoes were applied to multiple sections throughout the 394 page bill.

7. See, e.g., Assemb. J. Res. 1, 98th Leg., Reg. Sess. (Wis. 2007) (second consideration of Enrolled J. Res. 46, 2005 Wis. Sess. Laws 1); S.J. Res. 33, 97th Leg., Reg. Sess. (Wis. 2005); Assemb. J. Res. 52, 97th Leg., Reg. Sess. (Wis. 2005); Assemb. J. Res. 56, 97th Leg., Reg. Sess. (Wis. 2005).

8. For example, Governor Tommy Thompson applied his veto pen 457 times during consideration of the 1991–1992 biennial budget bill. WIS. LEGISLATIVE REFERENCE BUREAU, INFORMATIONAL BULLETIN 04-1, THE PARTIAL VETO IN WISCONSIN 17 (2004); see also Steven Walters, *Vetoes Strike at Spending Power*, MILWAUKEE J. SENTINEL, July 30, 2005, at 1A.

9. "Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law." WIS. CONST. art. V, § 10(b)(1).

10. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 3.

11. While the partial veto power was added to the Wisconsin Constitution in 1930, the most significant use and expansion of partial veto powers occurred after 1969. *Id.* at 4–5.

long as what remains after the veto(es) is “complete and workable law.”<sup>12</sup> Integral to the supreme court’s partial-veto jurisprudence has been its interpretation of the word “part” in article V, section 10.<sup>13</sup> The governor may partially veto any language in an appropriation bill, including the purpose of the appropriation, the amount of the appropriation, any conditions placed on the appropriation, and any non-appropriation-related policy language.

Legislation authorizing an expenditure of money within its four corners is considered an appropriation bill and is subject to the governor’s partial veto authority.<sup>14</sup> This includes the massive biennial state budget bill.<sup>15</sup> The biennial state budget bill is a comprehensive financial statement covering “all of the major fiscal and operations aspects of all state agencies and local government entities (municipalities, schools, and others).”<sup>16</sup> In general, the budget bill sets the levels of state expenditures and revenues for the two-year fiscal biennium.<sup>17</sup> Because of the biennial budget’s complexity and importance as a “financial expression of public policy,”<sup>18</sup> an enrolled budget bill<sup>19</sup> presents ample opportunity for a governor to unilaterally alter state spending and policy priorities to conform to his or her political goals.<sup>20</sup>

Controversy has surrounded the partial veto since its inception in 1930.<sup>21</sup> Following either novel or obscenely extensive use of the partial veto, legislators and commentators have cried foul. Subsequent legal

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12. State *ex rel.* Wis. Senate v. Thompson, 144 Wis. 2d 429, 450, 424 N.W.2d 385, 389 (1988) (quoting State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 707–08, 264 N.W.2d 539, 551 (1978)).

13. See John Wietzer, Comment, *The Wisconsin Partial Veto: Where Are We and How Did We Get Here? The Definition of “Part” and the Test of Severability*, 76 MARQ. L. REV. 625, 625 (1993).

14. State *ex rel.* Finnegan v. Dammann, 220 Wis. 143, 147, 264 N.W. 622, 624 (1936).

15. WIS. LEGISLATIVE COUNCIL, *supra* note 3, at 3.

16. *Id.* at 1.

17. *Id.*

18. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER 67, STATE BUDGET PROCESS 1 (2005).

19. Once identical versions of a bill pass both the state assembly and the state senate, the bill is referred to as an “enrolled bill” and is ready for the governor’s consideration. *Id.* at 11. The enrolled budget bill is not sent to the governor until the governor formally calls for the bill. *Id.* at 11–12.

20. See Jeff Mayers, *Gubernatorial Creative Writing: Changing the Legislature’s Mind*, 14 WIS. INTEREST 27, 27–28 (2005).

21. See Steven Walters, *Partial Veto Battle Goes Back a Century*, MILWAUKEE J. SENTINEL, Aug. 12, 2005, at 1B; see also Walters, *supra* note 8.

challenges to governors' uses of the partial veto power have largely been rebuffed; through a series of decisions addressing the extent of the partial veto, the Wisconsin Supreme Court has cornered itself into an amusingly broad interpretation of gubernatorial authority.<sup>22</sup> Finding little recourse in the judiciary, critics in the legislature have repeatedly proposed constitutional amendments to limit the governor's partial veto authority.<sup>23</sup> Since the inception of Wisconsin's partial veto in 1930, only one amendment to article V, section 10 has been enacted. Specifically, in 1990, Wisconsin's constitution was amended to eliminate the most offensive partial veto practice at the time: the "pick-a-letter veto."<sup>24</sup>

This Comment discusses the governor's partial veto powers and how past judicial decisions may impact future executive intrusions into traditionally legislative functions. Part II briefly examines the history of the partial veto in Wisconsin, including the Wisconsin Supreme Court's interpretation of article V, section 10. Part III explains why Governor Doyle's vetoes to the 2005–2007 budget reenergized debate over the partial veto in Wisconsin and examines a new and potentially crippling blow to the legislature's role in setting state fiscal policy. Part IV argues that despite the governor's extensive authority, Wisconsin's "executive-centered" partial veto does not warrant drastic reform. However, Governor Doyle's partial vetoes to the 2005–2007 budget bill have

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22. See *infra* Part II (discussing *Citizens Util. Bd. v. Klausner*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1975); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940); *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935)).

23. See legislation listed *supra* note 7; see also WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 18–19. Since the inception of Wisconsin's partial veto powers in 1930, over twenty proposed amendments to article V, section 10 have been introduced in the state legislature. *Id.*

24. The "pick-a-letter veto" refers to a governor vetoing individual letters in multiple words in order to create new words and sentences. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 6. Article V, section 10(1)(c) was added to the Wisconsin Constitution following the Wisconsin Supreme Court decision in *Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385, which approved the governor's use of the partial veto to create new words by the "pick-a-letter veto." WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 14–15. Article XII, section 1 of the Wisconsin Constitution requires that amendments to the constitution pass two consecutive legislatures and then be approved by the voters prior to taking effect. WIS. CONST. art. XII, § 1. The amendment passed two consecutive legislatures, 1987 and 1989, and was approved by the voters on April 3, 1990. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 19 tbl.3. The amendment added the following language: "(1)(c) In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill." WIS. CONST. art. V, § 10(1)(c).

scraped away a critical mass of the legislature's core functions; therefore, a narrow constitutional remedy is appropriate.

## II. THE PARTIAL VETO IN WISCONSIN

### A. Purpose and Development

Executive partial-veto powers have been a part of state constitutions since the Civil War.<sup>25</sup> Today, forty-three states entrust their governors with partial veto powers.<sup>26</sup> All but one of those states limits the partial veto authority to appropriation bills.<sup>27</sup> In granting the governor authority to veto parts of an appropriation bill, states primarily sought to prevent "logrolling" by legislators,<sup>28</sup> ensure balanced budgets, and permit broader involvement by the governor in budgetary decisions.<sup>29</sup> The breadth of the partial veto power varies considerably from state to state.<sup>30</sup>

Article V, section 10 of the Wisconsin Constitution grants the governor power to veto bills passed by the legislature. Appropriation bills may be vetoed "in whole or in part."<sup>31</sup> Appropriation bills authorize "the expenditure of public moneys and stipulat[e] the amount, manner, and purpose of the various items of expenditure."<sup>32</sup> Any "parts" of appropriation legislation vetoed by the governor are returned

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25. Richard Briffault, *The Item Veto: A Problem in State Separation of Powers*, 2 EMERGING ISSUES IN ST. CONST. L. 85, 86-87 (1989).

26. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 5. The seven states that do not have partial veto authority are Indiana, Maine, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont. *Id.* "Partial veto" authority may also be referred to as "item veto" authority depending on whether state law permits the governor to veto "items" or "parts" of legislation. While some commentators use the terms "partial veto" and "item veto" interchangeably, a court's distinctions between the terms "item" and "part" can be key in determining the extent of the veto authority. See *infra* Part II.B (discussing *State ex rel. Wis. Tel. Co.*, 218 Wis. at 310-11, 260 N.W. at 490-91).

27. Briffault, *supra* note 25, at 88. Washington does not limit the governor's partial veto powers to appropriations bills. *Id.*

28. See Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1177 (1993); see also *infra* note 40 and accompanying text.

29. *Id.*

30. See Briffault, *supra* note 25.

31. WIS. CONST. art. V, § 10(1)(b).

32. *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 148, 264 N.W. 622, 624 (1936) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY).

to the legislature with the governor's written objections.<sup>33</sup> Unless the legislature successfully overrides the governor's veto(es) by two-thirds majority vote in both chambers, the appropriation legislation, as partially vetoed by the governor, becomes law.<sup>34</sup>

Partial veto authority was added to article V, section 10 of the Wisconsin Constitution as a check on the legislature's practice of packaging multiple appropriation measures into single bills, which began in 1911.<sup>35</sup> Governor Francis McGovern publicly campaigned for partial veto authority starting in 1913.<sup>36</sup> Governor McGovern argued that executive involvement in the budget process, which is mandated by the state constitution, had been significantly hindered by the new budget system.<sup>37</sup> Under the new budget system, the governor no longer had any say over what was included in appropriation bills or what was kept out of them.<sup>38</sup> Partial veto authority, it was argued, would reassert the executive's role in producing the state's budget by allowing the governor flexibility when considering multiple topics included in omnibus appropriation bills.<sup>39</sup> Further, partial veto authority would help counter the "evil" of legislative "logrolling."<sup>40</sup> Legislative "logrolling" is "the practice of jumbling together[,] in one act[,] inconsistent subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their [own]."<sup>41</sup> In 1930,

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33. WIS. CONST. art. V, § 10. The governor's objections are included in the "governor veto message," which is delivered to the legislature along with the budget bill as vetoed by the governor. See *supra* note 6 and accompanying text.

34. WIS. CONST. art. V, § 10(2)(b).

35. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 4.

36. *Id.*

37. *Id.*

38. *Id.*

39. *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 445, 424 N.W.2d 385, 391 (1988).

40. *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 447-48, 289 N.W. 662, 664 (1940). The Wisconsin Supreme Court in *Martin v. Zimmerman*, found that the prevention of legislative "logrolling" was the primary impetus behind granting the governor partial veto authority. *Id.* at 447, 289 N.W. at 664. In 1988, however, the court in *Wisconsin Senate v. Thompson* disagreed with the *Martin* court's conclusion that the prevention of logrolling was the primary purpose of the partial veto authority, finding instead that partial veto power was primarily intended to reassert the governor's "quasi-legislative" role in the budget process. *Wis. Senate*, 144 Wis. 2d at 446, 424 N.W.2d at 391. By focusing on the governor's "quasi-legislative" role, the *Wisconsin Senate* court was better able to justify its conclusion that the governor may use the partial veto authority to essentially rewrite appropriation bills.

41. *Martin*, 233 Wis. at 447-48, 289 N.W. at 664. This definition of "logrolling" is distinguished from the statutory crime of "logrolling" defined in section 13.05 of the Wisconsin Statutes. *Wis. Senate*, 144 Wis. 2d at 446, 424 N.W.2d at 392 (1988). Under section

voter approval added gubernatorial partial veto authority to the Wisconsin Constitution.<sup>42</sup>

Challenges to the governor's partial veto authority followed shortly after enactment, and in 1935 the Wisconsin Supreme Court heard its first case on the matter.<sup>43</sup> While the modern, expansive use of the partial veto by Wisconsin governors did not take form until after 1969,<sup>44</sup> the early decisions of the Wisconsin Supreme Court, starting in 1935 with *Wisconsin Telephone Co. v. Henry*,<sup>45</sup> laid the foundation for subsequent court opinions that would approve the "digit veto,"<sup>46</sup> the "edit veto,"<sup>47</sup> the "pick-a-letter veto,"<sup>48</sup> the "write-in veto,"<sup>49</sup> and the "Frankenstein veto."<sup>50</sup>

### *B. The Definition of "Part" and the Governor's Quasi-Legislative Function*

As opposed to other state constitutions that permit the governor to veto only "items" in an appropriation bill, the Wisconsin Constitution's guidance that the Wisconsin governor may veto appropriation bills "in

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13.05, Wisconsin legislators are prohibited from exchanging a favorable vote regarding a pending legislative proposal in return for a favorable vote regarding another pending legislative proposal. WIS. STAT. § 13.05 (2003–2004).

42. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 4. The partial veto authority in article V, section 10 was ratified by the voters on November 4, 1930. *Id.* The amendment had passed two consecutive legislatures in 1927 and 1929. *Id.* Ironically, the voters also gave the Wisconsin governorship to Phillip LaFollette, a leading critic of the "partial veto" amendment in 1930. *See id.* at 5. During the campaign, LaFollette argued that the partial veto would grant the executive too much power over state spending matters. *Id.*

43. *See State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935).

44. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 5.

45. 218 Wis. 302, 260 N.W. 486.

46. *See* WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 6. The "digit veto" refers to the governor's removal of a single digit from an appropriation amount. For example, vetoing the number "2" from a \$25,000,000 appropriation, thereby reducing the amount to \$5,000,000 would be an application of the digit veto.

47. *See id.* The "edit veto" refers to the governor's deletion of key words conditioning appropriation amounts. For example, vetoing the "not" in a phrase "not less than 50%" and thereby altering the purpose of the language would be an application of the edit veto.

48. *See supra* note 24 and accompanying text (discussing the pick-a-letter veto). The pick-a-letter veto is also commonly called the "Vanna White veto," in reference to the co-host of television's "Wheel of Fortune" game show. *See* Mayers, *supra* note 20, at 28.

49. *See* Risser v. Klauser, 207 Wis. 2d 176, 180, 558 N.W.2d 108, 110 (1997). The "write-in veto" refers to a governor crossing out an entire appropriation amount and writing a different, lower amount in its place. *Id.*

50. The "Frankenstein veto" refers to taking various words from multiple sentences to create new sentences. *See* Walters, *supra* note 8.



part” implies expansive application.<sup>51</sup> In *Wisconsin Telephone Co. v. Henry*, the Wisconsin Supreme Court’s first decision on the partial veto, the court stated:

[i]f, in conferring partial veto power, by the amendment of sec. 10, art. 5, Wisconsin Constitution, in 1930, it was intended to give the executive such power only in respect to an item or part of an item in an appropriation bill, then why was not some such term as either “item” or “part of an item” embodied in that amendment, as was theretofore done in similar constitutional provisions in so many other states, instead of using the plain and unambiguous terms “part” and “part of the bill objected to,” without any words qualifying or limiting the well-known meaning and scope of the word “part?”<sup>52</sup>

The *Henry* court upheld the governor’s partial veto of certain sentences included in an emergency relief appropriation measure that were not tied to the appropriation itself.<sup>53</sup> The court reasoned article V, section 10’s lack of “qualifying or limiting” words on the governor’s ability to veto “in part” conferred on the governor power “as coextensive as the legislature’s power to join and enact separable pieces of legislation.”<sup>54</sup> As the legislature may “unite as many subjects in one bill as it chooses,” the governor may “pass independently on every separable piece of legislation in an appropriation bill.”<sup>55</sup> Five years later, the court in *Martin v. Zimmerman* would reassert the governor’s partial veto authority as a check against the evil of logrolling that is “inherent in the lawmaking processes in connection with appropriation measures.”<sup>56</sup>

In 1973, Governor Patrick Lucey tested the limits of article V, section 10 by vetoing individual digits composing specific appropriation amounts. In particular, the governor reduced a \$25,000,000 highway improvement authorization to \$5,000,000 by selectively crossing out the leading digit “2.”<sup>57</sup> In an opinion letter to the Senate Committee on

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51. State *ex rel.* Wis. Tel. Co. v. Henry, 218 Wis. 302, 310–11, 260 N.W. 486, 490–91 (1935).

52. *Id.* at 313, 260 N.W. at 491.

53. *Id.* at 317, 260 N.W. at 493.

54. *Id.* at 313, 315, 260 N.W. at 491–92.

55. *Id.* at 315, 260 N.W. at 492.

56. State *ex rel.* Martin v. Zimmerman, 233 Wis. 2d 442, 448, 289 N.W. 662, 664 (1940); see also *supra* note 40 and accompanying text.

57. Assemb. Journal, 81st Leg., Reg. Sess. 2413 (Wis. 1973) (governor’s veto message).

Organization, the state attorney general concluded that Governor Lucey's digit veto was unconstitutional and that, instead of reducing the amount, the governor's objection to an individual digit must constitute an objection to the entire subsection to which the digit is a part.<sup>58</sup> However, the supreme court did not pass on Governor Lucey's specific digit veto, and the digit veto concept has been employed by subsequent governors.<sup>59</sup>

The supreme court's 1978 decision in *Klecza v. Conta* reaffirmed the governor's broad power to veto "parts" of legislation as a constitutional "check" on the legislature.<sup>60</sup> In approving the edit veto,<sup>61</sup> the court held that legislatively imposed conditions on appropriations are "parts" of the bill subject to the governor's partial veto authority.<sup>62</sup> That the governor's removal of conditions imposed on appropriation legislation may constitute changes in policy is of no consequence.<sup>63</sup>

Applying a "common sense" reading of the word "part," the supreme court in 1995 upheld Governor Tommy Thompson's write-in

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58. 62 Op. Wis. Att'y Gen. 238 (1973). While the attorney general's opinion concluded that the digit veto is unconstitutional, attorney general opinions do not carry the force of law. *State ex rel. LaFollette v. Stitt*, 114 Wis. 2d 358, 375, 338 N.W.2d 684, 692 (1983).

59. Following the attorney general's opinion disfavoring the digit veto, Governor Lucey, though disagreeing with the attorney general's opinion, advised the legislature to consider his digit veto an objection to the entire section, thereby ending that particular dispute. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 13.

60. *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 706-09, 264 N.W.2d 539, 551-52 (1978).

61. See example *supra* note 47.

62. *Kleczka*, 82 Wis. 2d. at 704-05, 264 N.W.2d at 550. In *Kleczka v. Conta*, the court considered the governor's creation of a new appropriation never approved by the legislature. *Id.* at 704, 264 N.W.2d at 549. The legislation at issue provided that by checking a box on their tax form, taxpayers could add one additional dollar to their income taxes that would be dedicated to a state election campaign fund. *Id.* at 685, 264 N.W.2d at 541. Through partial veto, the governor turned the "check off" into an affirmative appropriation in which taxpayers could mark one dollar of their *current* tax obligation to the election fund. The result was a new \$600,000 appropriation where no such appropriation existed before. The court rejected the petitioner's challenge that the bill itself was not an appropriation. *Id.* at 688-89, 264 N.W.2d at 542-43. The court determined that because the original bill would appropriate the additional "check-off" funding for election purposes, there was an appropriation. The governor's veto merely changed the source of the appropriation from money voluntarily donated, to a mandatory expenditure from the general fund. *Id.* at 705, 264 N.W.2d at 550.

63. *Id.* at 715, 264 N.W.2d at 555. In dissent, Justice Hansen found that the court misinterpreted *Wisconsin Telephone Co. v. Henry*, and that the partial veto power of the governor was never intended to stretch as far as the majority held. *Id.* at 722, 264 N.W.2d at 558 (Hansen, J., dissenting).

veto<sup>64</sup> whereby the governor crossed out an appropriation amount and penciled in a different, lower amount.<sup>65</sup> In *Citizens Utility Board v. Klauser*, the court noted the “superficial appeal” of limiting the governor’s veto to only those letters, digits, and marks specifically included in the legislation; however, the court held the penciled-in amount was a “part” of the former amount.<sup>66</sup> Specifically, the governor crossed out “\$350,000,” which was allocated by the legislature to the Public Service Commission, and wrote in “\$250,000.”<sup>67</sup> The court reasoned that

the governor has the authority to reduce appropriations. Further . . . the governor could, by striking digits, reduce \$350,000 to a variety of lesser amounts including \$50,000, \$35,000, \$30,000, \$5,000, \$3,500, . . . \$5, \$3, or even \$0. If the governor has it within his authority to reduce the \$350,000 appropriation as recognized above, it seems absurd that he could not also reduce the sum to \$250,000, which . . . is clearly a “part” of \$350,000.<sup>68</sup>

Less than two years later, the legislature would again challenge Governor Tommy Thompson’s use of the write-in veto. In *Risser v. Klauser*, the court determined that the governor may replace only appropriation amounts, not other monetary amounts that may be included in an appropriation bill.<sup>69</sup> Holding that the governor’s

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64. *Risser v. Klauser*, 207 Wis. 2d 176, 180, 558 N.W.2d 108, 110 (1997) (noting that the write-in veto was first recognized in *Citizens Utility Board v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995)).

65. *Citizens Util. Bd.*, 194 Wis. 2d at 506, 534 N.W.2d at 616.

66. *Id.* at 506–07, 534 N.W.2d at 616.

67. *Id.* at 489, 534 N.W.2d at 609.

68. *Id.* at 506–07, 534 N.W.2d at 616. In dissent, Justice Abrahamson disagreed with the majority’s approval of the write-in veto. Justice Abrahamson noted the discrepancy in limiting the write-in veto to monetary figures when past holdings “acknowledged that a governor’s partial veto power extends equally to words, dollar figures, and other numbers contained in an appropriation bill.” *Id.* at 512, 534 N.W.2d at 618 (Abrahamson, J., dissenting).

69. *Risser*, 207 Wis. 2d at 176, 180, 558 N.W.2d at 110. In *Citizens Utility Board*, the majority opinion stated that the governor’s write-in veto authority applies only “to monetary figures and is not applicable in the context of any other aspect of an appropriation.” *Citizens Util. Bd.*, 194 Wis. 2d at 510, 534 N.W.2d at 617. In *Risser*, the governor argued that *Citizens Utility Board* may have limited the write-in veto to monetary figures, but that the write-in authority may apply to any monetary figures included within an appropriation bill, not only appropriation figures. *Risser*, 207 Wis. 2d at 185, 558 N.W.2d at 112. At issue in *Risser* was

replacement of a revenue bond limit was unconstitutional because it was not an appropriation amount,<sup>70</sup> the court handed the governor a rare defeat in the continual battle over the partial veto in Wisconsin.

### C. The "Complete, Entire, and Workable Law" Test

Tied to the Wisconsin Supreme Court's reasoning that the governor's "partial" veto authority is "quasi-legislative," the "complete, entire, and workable law" test<sup>71</sup> has proven to be the most influential and controversial principle in the partial-veto debate.<sup>72</sup> In *Wisconsin Telephone Co. v. Henry*, the court declared that the governor has acted within his authority under article V, section 10 if "the parts approved . . . constitute, in and by themselves, a complete, entire, and workable law."<sup>73</sup> "Complete and workable law" is law "on fitting subjects for a separate enactment by the legislature."<sup>74</sup>

The "complete and workable law" test has been cited in each subsequent supreme court opinion interpreting the governor's partial veto power under article V, section 10.<sup>75</sup> The "complete and workable law" test is an objective test "focused solely on the law-after-veto."<sup>76</sup> By focusing on the resulting law, and not on the process, the governor's potential alteration of appropriation bills by partial veto is not curtailed by notions of legislative intent.<sup>77</sup> For example, in *Sundby v. Adamany*, the court rejected the argument that the governor may not, by partial veto, affirmatively legislate by changing the meaning, purpose, or impact of a particular piece of legislation without regard for the legislature's

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the governor's strikethrough and subsequent write-in of a figure setting a revenue bonding limit in an omnibus transportation measure. *Id.* at 184–85, 558 N.W.2d at 111–12.

70. *Risser*, 207 Wis. 2d at 181, 558 N.W.2d at 110.

71. *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 314, 260 N.W. 486, 491–92 (1935). In various opinions regarding the partial veto, the court has referred to the concept of "complete, entire, and workable law" as, among other things, "complete and workable law," *State ex rel. Wisconsin Senate v. Thompson*, 114 Wis. 2d 429, 453, 424 N.W.2d 385, 394 (1988), and the "workable-law test," *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 707, 264 N.W.2d 539, 551 (1978). This Comment uses the above phrases interchangeably.

72. *See Briffault*, *supra* note 28, at 1196.

73. *Henry*, 218 Wis. at 314, 260 N.W. at 491.

74. *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 449, 289 N.W. 662, 665 (1940).

75. *See Risser*, 207 Wis. 2d at 183, 558 N.W.2d at 111; *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 504–05, 534 N.W.2d 608, 615 (1995); *Wis. Senate*, 114 Wis. 2d at 453, 424 N.W.2d at 394; *Kleczka*, 82 Wis. 2d at 707, 264 N.W.2d at 551; *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 129, 237 N.W.2d 910, 915 (1976); *Martin*, 233 Wis. at 450, 289 N.W. at 665.

76. *See Briffault*, *supra* note 28, at 1196.

77. *See id.*

intent in crafting and passing that legislation.<sup>78</sup> The court reasoned that, as “[e]very veto has both a negative and affirmative ring about it . . . [t]here is always a change of policy involved.”<sup>79</sup>

Further illustrating the governor’s independent legislative authority to deconstruct and reconstruct appropriation bills, the pick-a-letter veto,<sup>80</sup> first employed by Governor Anthony Earl in 1983,<sup>81</sup> empowered the governor to make up new words by selecting individual letters from words and vetoing all other letters between the selected letters. While Governor Earl’s reduction of a 121 word paragraph into a new, twenty-two word sentence comprised of unassociated letters, digits, and words so offended the legislature that it unanimously overrode the governor’s actions,<sup>82</sup> the legislature’s reaction to this practice became less philosophical and more political over time.<sup>83</sup>

The Wisconsin Supreme Court considered and approved the pick-a-letter veto in *Wisconsin Senate v. Thompson*.<sup>84</sup> As noted by the title of the case, *Wisconsin Senate* sprouted from the legislature’s revulsion at Governor Tommy Thompson’s record 290 creative partial vetoes to the budget bill for 1987–1989.<sup>85</sup> In that case, Governor Thompson had selectively vetoed “phrases, digits, letters, and word fragments” in the biennial budget to create new words and sentences and to reduce individual appropriation amounts.<sup>86</sup> Over the dissent of three justices, the majority upheld the governor’s use of the partial veto to strike

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78. See *Sundby*, 71 Wis. 2d at 134, 237 N.W.2d at 918. Affirmative application of the partial veto refers to the governor’s ability to create new legislative language regardless of legislative intent. Negative application of the partial veto refers to the governor’s use of the veto to block enactment of separate legislative provisions. See Briffault, *supra* note 28, at 1186.

79. See *Sundby*, 71 Wis. 2d at 134, 237 N.W.2d at 918.

80. See description and example *supra* note 24.

81. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 6.

82. *Id.* The vote to override Governor Earl’s “pick-a-letter vetoes” was unanimous in the assembly and nearly unanimous in the senate, with one dissenting vote.

83. See Anthony S. Earl, *Personal Reflections on the Partial Veto*, 77 MARQ. L. REV. 437, 440–41 (1994). Governor Earl notes that his “pick-a-letter vetoes” were overridden by the legislature due to concerns over the balance of power. However, under his successor, Governor Tommy Thompson, the legislature sustained Governor Thompson’s “pick-a-letter vetoes” because the Republican minority in the legislature would not provide the votes necessary to override the actions of the Republican governor. *Id.*

84. 114 Wis. 2d 429, 424 N.W.2d 385 (1988).

85. *Id.* at 433, 424 N.W.2d at 386. Governor Thompson himself would later shatter this record by exercising his partial veto power 457 times during consideration of the 1991–1993 budget bill. See WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 17 tbl.2.

86. *Wis. Senate*, 114 Wis. 2d at 433, 424 N.W.2d at 386.

individual digits and letters from appropriations bills.<sup>87</sup> The majority closed the door to the petitioners' separation of powers challenge by reaffirming the governor's "specially constitutionally recognized role" regarding appropriation legislation.<sup>88</sup> The only "restriction" placed on the governor's power by the *Wisconsin Senate* court was that the post-veto language must relate to the same subject matter as the original legislation.<sup>89</sup> However, this is a low hurdle and the court noted that none of Governor Thompson's 290 partial vetoes to the 1987–1989 biennial budget bill violated this "germaneness" requirement.<sup>90</sup> According to the court, the decision in *Wisconsin Senate* "makes no new law."<sup>91</sup> The dissent strongly disagreed, finding that the majority's decision was "an invitation to terrible abuse."<sup>92</sup>

Following the decision in *Wisconsin Senate*, the legislature approved a bipartisan constitutional amendment to ban the pick-a-letter veto.<sup>93</sup> The amendment was ratified by the voters on April 30, 1990.<sup>94</sup> The amendment added article V, section 10(1)(c), which provides that "[i]n approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill."<sup>95</sup>

#### *D. The Legislature's Uncashed "Check"*

The power to veto legislation (or parts of legislation) exemplifies the governor's role in the legislative process and serves as part of the checks and balances inherent in the constitutional system.<sup>96</sup> Similarly, the legislature reserves the power to override the governor's vetoes.<sup>97</sup> However, not since 1985 has the Wisconsin legislature successfully overrode a governor's partial veto(es) to an appropriation bill.<sup>98</sup> Veto overrides require the approval of two-thirds of the members present in

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87. *Id.* at 437, 424 N.W.2d at 387–88.

88. *Id.* at 454, 424 N.W.2d at 395.

89. *Id.* at 452, 424 N.W.2d at 394.

90. *Id.* at 451–52, 424 N.W.2d at 394.

91. *Id.* at 463, 424 N.W.2d at 398.

92. *Id.* at 466–67, 424 N.W.2d at 400 (Bablitch, J., dissenting in part, concurring in part).

93. See explanation *supra* note 24.

94. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 12.

95. WIS. CONST. art. V, § 10(1)(c).

96. State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 709 & n.3, 264 N.W.2d 539, 552 & n.3 (1978).

97. WIS. CONST. art. V, § 10(2)(b).

98. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 3.

both houses of the legislature, and as such, may be quashed by as few as twelve legislators.<sup>99</sup> Appropriation bills, especially the budget bill, are often intensely political, and legislators sharing the same party affiliation as the governor are often wary about handing their governor a political defeat.<sup>100</sup>

### III. THE CURRENT DEBATE

In the 2005–2007 biennial budget bill, two provisions created by Governor Doyle’s artful use of the partial-veto pen aptly illustrate the extent of the Wisconsin governor’s ability to tailor state spending to his or her political agenda. The first provision nearly doubled the amount of state aid to public schools that had been approved by the legislature.<sup>101</sup> The second provision potentially granted the state secretary of administration unrestricted authority to shift funds between appropriation accounts.<sup>102</sup> These provisions have sparked new debate over the governor’s partial veto powers and present new concerns about executive intrusion into core legislative functions.

#### A. *The Partial Veto in Practice: The 2005 Education Funding Battle*

Governor Doyle’s selective vetoing of paragraphs, sentences, words, and digits to redirect more than \$400 million to public school aid and increase the per-pupil revenue limit to \$248 in 2005–2006<sup>103</sup> followed a three-year battle between the Democratic governor and the Republican-controlled legislature over how to limit property taxes while adequately funding public schools.<sup>104</sup> In his 2005–2007 budget proposal, Governor Doyle recommended a \$938 million increase in state aid to public

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99. See *State ex rel. Wis. Senate v. Thompson*, 114 Wis. 2d 429, 466, 424 N.W.2d 385, 400 (1988) (Bablitch, J., dissenting in part, concurring in part). The Wisconsin Senate seats thirty-three senators. WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 2005–2006 BLUE BOOK 255 (2005). For a successful veto override, twenty-two senators must approve the override. In other words, if twelve senators reject the override, the governor’s veto(es) will stand.

100. See WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 3; see Mayers, *supra* note 20, at 28.

101. 2005–2007 Biennial State Budget, Act 25, § 9155, 2005 Wis. Sess. Laws 1, 378–82; Assemb. Journal, 97th Leg., Reg. Sess. 373, 386 (Wis. 2005) (governor’s veto message).

102. Act 25, § 9255, 2005 Wis. Sess. Laws at 385.

103. Assemb. Journal, 97th Leg., Reg. Sess. at 386.

104. See, e.g., Steven Walters, *Doyle Vetoes Property Tax Cap: He Also Rejects GOP Plan to Expand School Choice*, MILWAUKEE J. SENTINEL, July 25, 2003, at 1A; Steven Walters, *Doyle Tinkers With Property Tax Limits in Republicans’ Budget*, MILWAUKEE J. SENTINEL, July 24, 2005, at 1B.

schools, and a \$248 per-pupil revenue limit increase, which impacts local property tax burdens.<sup>105</sup> In contrast, the Republican legislature sought to increase state aid to public schools by only \$458 million<sup>106</sup> and limit local per-pupil revenue to an increase of \$120 in 2005–2006.<sup>107</sup>

While the governor's proposal provided significantly more aid to public schools, both proposals intended to benefit local school districts by increasing the state's share of public school funding while at the same time limiting local governments' incentive and ability to raise property taxes.<sup>108</sup> In Wisconsin, the state limits the amount that individual school districts may increase per-pupil revenue in a given year.<sup>109</sup> School district revenue comes from state aid, tax credits, and property taxes.<sup>110</sup> The "revenue limit" determines the maximum amount of revenue that a school district may raise through local property taxes.<sup>111</sup> Thus, both the amount of state aid to public schools and the limit on per-pupil revenue increases become interdependent policy issues that command political attention.

While the enrolled bill included the legislature's preferred numbers for school aid and revenue limits, the governor prevailed in the 2005–2007 education funding battle by creatively vetoing numerous unrelated sections of the budget to redirect funding from other accounts into public school aid. For example, the governor created a sentence that transfers \$427 million from various transportation funds into the general fund.<sup>112</sup> In another section, the governor shifted some of those funds to education by creating a sentence transferring \$330 million from the

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105. Steven Walters & Stacy Forster, *Veto of Entire Budget Seen as Unlikely*, MILWAUKEE J. SENTINEL, July 7, 2005, at 1B. Under Doyle's budget proposal, the revenue limit would have increased to \$252 in 2006–2007. Assemb. Journal, 97th Leg., Reg. Sess. at 386.

106. Walters et al., *supra* note 3; *see also* Walters & Forster, *supra* note 105.

107. Walters et al., *supra* note 3. The revenue limit would decrease to \$100 per pupil in 2006–2007. *Id.*

108. *See id.*; *see also* Assemb. Journal, 97th Leg., Reg. Sess. at 374. The revenue limits under the governor's and legislature's proposals, \$248 and \$120 in 2005 and 2006 respectively, prevent local governments from increasing property taxes above those limits to fund schools. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER 12, LOCAL GOVERNMENT EXPENDITURE AND REVENUE LIMITS 1 (2005) [hereinafter EXPENDITURE AND REVENUE LIMITS].

109. EXPENDITURE AND REVENUE LIMITS, *supra* note 108, at 1. The revenue limits placed on school districts were first imposed in 1993 and were made permanent in 1995. *Id.*

110. *Id.*

111. *Id.*

112. 2005–2007 Biennial State Budget, Act 25, § 9148, 2005 Wis. Sess. Laws 1, 372–74.



general fund into public school aid.<sup>113</sup> The \$427 million transfer was cobbled together by selectively taking the following phrases and words from separate sections: “the department of transportation shall” “transfer” “to the” “general” “fund” “from” “the transportation fund” “[i]n the 2005–2007 fiscal biennium” “\$4” “2” “7” “0” “0” “0,000.”<sup>114</sup> Paragraphs, sentences, words, and individual digits in between each word, phrase, or digit used in the new sentence were crossed out.<sup>115</sup>

Creating new sentences from phrases, words, and digits, is not a new technique; the new sentence transferring \$427 million away from the transportation fund merely illustrates the governor’s current power to rewrite appropriating legislation to fit his or her agenda. Bill drafters’ attempts to “veto proof” legislation<sup>116</sup> cannot prevent creative governors from picking apart language and numbers to alter policy and spending decisions so long as the law-after-veto is complete and workable law.<sup>117</sup> However, as discussed in Part III.B below, in applying this expansive ability to cobble together new sentences to section 9255 of the 2005–2007 budget bill, thereby granting the secretary of administration potentially unregulated authority to shift funds between accounts, Governor Doyle may have violated the “complete and workable law” test. Beyond that, the governor’s vetoes to section 9255 challenge the separation of powers doctrine to the extent that jurisprudential rules like the complete and workable law test may be unhelpful in settling disputes over the governor’s veto authority.

*B. New Concerns: The Unelected Appropriator and a Prescription for Future Conflicts*

Applying the full extent of his partial veto authority to section 9255 of the 2005–2007 budget bill, Governor Doyle pulled individual words from various sentences to create the following provision:

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113. Act 25, § 9155, 2005 Wis. Sess. Laws at 378–80; Memorandum from Bob Lang, Dir. of Wis. Legislative Fiscal Bureau, to members of the Wis. Legislature (Aug. 16, 2005) (“Comparison of Potential Impact of Fiscal Controls Under Enrolled AB 100 and Act 25.”), available at [http://www.legis.state.wi.us/lfb/2005-07budget/081605\\_WILEG\\_fiscal%20controls.pdf](http://www.legis.state.wi.us/lfb/2005-07budget/081605_WILEG_fiscal%20controls.pdf).

114. Act 25, §§ 9148(4f), (4w), (5f), (5g), 2005 Wis. Sess. Laws at 373–74.

115. *Id.* The governor selected the “4” from a \$484,000 streetscaping project in the Village of Oregon. The following “2” and “7” were selected from a reference to the 2005–2007 biennium. The next two “0’s” were selected from references to Wisconsin Statutes section 20.395 and section 85.026. The final “0’s” were selected from an \$80,000 grant to Chippewa County for a railroad crossing. *Id.*

116. Mayers, *supra* note 20, at 28.

117. See *supra* Part II.C (discussing the complete and workable law test).

Section 9255. Appropriation changes; other

(1) THE GENERAL FUND.

(a) *Appropriation lapses to the general fund.* from appropriation accounts, the secretary of administration shall lapse to the general fund

\$71,234,800.

(b) *transfers.* The secretary of administration may transfer moneys to any appropriation account or FUND from the general fund.<sup>118</sup>

Alarmingly, this language-after-veto appears to give the secretary of the state Department of Administration the power to move unspecified amounts of money out of appropriation accounts and redirect that money at his or her discretion. This interpretation appears to be supported by the governor's veto message accompanying the 2005–2007 budget bill. In the veto message, Governor Doyle indicated that the partial vetoes to section 9255 are intended to give the administration “greater flexibility” in financing certain aspects of state government by authorizing the “Department of Administration secretary to transfer revenue from the general fund to any appropriation account or fund.”<sup>119</sup> Leadership in the legislature immediately attacked the new language as an illegal usurpation of the legislature’s “gatekeeper” role over state finances and requested an attorney general opinion on the matter.<sup>120</sup>

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118. Act 25, §§ 9255(1a), (1b), (2), 2005 Wis. Sess. Laws at 385–87. The awkward phrasing of this provision does itself present a problem to enactment. In *Wisconsin Senate v. Thompson*, the Wisconsin Supreme Court dismissed the argument that partial “vetoes are invalid because the resulting provisions are inartful, clumsy, [or] ungrammatical” and stated that “the test applied to determine the validity of the governor’s partial vetoes is not one of grammar.” 144 Wis. 2d 429, 462–63, 424 N.W.2d 385, 398 (1988).

119. Assemb. Journal, 97th Leg., Reg. Sess. 404 (Wis. 2005) (governor’s veto message). In his veto message, the governor provided instructions for how the secretary *should* shift certain funding following future administrative and legislative action. *Id.*

120. Walters, *supra* note 8 (quoting Assistant Senate Majority Leader Neal Kedzie as stating “we need to be clear what [state legislators’] jobs are” in light of the governor’s vetoes). Wisconsin Senate President Alan Lasee requested an opinion from the state attorney general regarding this apparent grant of appropriation authority to the secretary of administration, a non-elected official, and the apparent intrusion into the legislature’s constitutional role in appropriating state funds. See Letter from Sen. Lasee to Attorney General, *supra* note 4.

The attorney general determined that the vetoes to section 9255 would likely be upheld if challenged in court.<sup>121</sup> In reaching this conclusion, the attorney general relied on (1) the Wisconsin Supreme Court's broad interpretation of the governor's partial veto authority; (2) the high burden imposed on a party seeking to invalidate a state law; (3) and the concept of statutory interpretation, which, despite the lack of limiting language in the text of the section, sets limits on the secretary's reallocation authority. It is this last premise, conceptual limitations not found in the text of the bill or the constitution, that provides the potential for abuse by future governors and damages the ability of the supreme court to justify its deferential partial veto jurisprudence.

### 1. Making Section 9255 Constitutional

The legality of the governor's vetoes to section 9255 turns on whether the *legislature* itself could legally grant the secretary such broad appropriating authority. Under the "complete and workable law test," the governor's vetoes are presumably valid "so long as the net result of the partial veto is a complete, entire and workable bill which the legislature could have passed in the first instance."<sup>122</sup> Because the partial veto did not explicitly restrict the secretary's new appropriation authority, it is debatable whether the legislature itself could have passed this language "in the first instance."

While the appropriation power is not an exclusive power of the legislature,<sup>123</sup> the "legislature . . . has clear constitutional authority to appropriate scarce resources,"<sup>124</sup> and the executive "is prohibited from unduly burdening or substantially interfering" with the legislature's power.<sup>125</sup> The legislature may delegate to the executive branch certain

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121. Advisory Opinion of Wis. Att'y Gen. to Alan J. Lasee, President, Wis. Senate (Aug. 12, 2005) [hereinafter Advisory Opinion], [http://www.doj.state.wi.us/ag/opinions/2005\\_08\\_12Lasee.pdf](http://www.doj.state.wi.us/ag/opinions/2005_08_12Lasee.pdf).

122. *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 449, 424 N.W.2d 385, 393 (1988) (quoting *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 715, 264 N.W.2d 539, 555 (1978)).

123. See *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 552, 576 N.W.2d 245, 257 (1998). The *Flynn* court found that the appropriation power is a power shared, to a certain extent, by all three branches of state government. Each branch of state government has "exclusive core constitutional powers" but beyond those core powers are "great borderlands of power" that are shared among the three branches. *Id.* at 545-46, 576 N.W.2d at 255 (quoting *State ex rel. Friedrich v. Dane County Cir. Ct.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32, 36 (1995)).

124. *Id.* at 552, 576 N.W.2d at 257.

125. *Id.* at 546, 576 N.W.2d at 255. As a bright-line rule, unilateral reallocation of appropriations by the executive branch constitutes a "substantial interference" with the legislature's core powers and is therefore prohibited. See *id.* at 542, 576 N.W.2d at 253.

powers not otherwise constitutionally specified or inherent in the executive's authority; however, the constitution sets limits on the extent that core powers may be delegated from the legislature to another branch of government.<sup>126</sup> The attorney general concluded that the legislature could have granted the secretary power to shift funds between appropriation accounts only if that power is accompanied by restrictions and instructions.<sup>127</sup> Without such safeguards, the legislature may be unlawfully abrogating its constitutional role in the appropriation process.<sup>128</sup>

Here, the attorney general found that the rules of statutory construction would limit the secretary's authority.<sup>129</sup> While the language of section 9255 does not itself place any restrictions on the secretary's ability to transfer funds, the language of section 9255 must be read in context with the surrounding sections and subsections of the budget bill.<sup>130</sup> By looking to the surrounding sections, the legislature's intent for making the individual appropriations included in the budget bill may be found and the appropriation-shifting authority granted to the secretary by section 9255, as vetoed, may be narrowed accordingly.<sup>131</sup> In particular, the need to harmonize (1) specific funding allocations to the many state programs with (2) the authority granted to the secretary to

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However, this bright line rule is not impacted because, despite the fact that it was the governor's creative partial vetoes that created the language of section 9255, the legislature's failure to override the vetoes leaves the provision as properly enacted law—the secretary's authority is deemed authorized by the legislature and the secretary would not be acting “unilaterally.”

126. *See* *Panzer v. Doyle*, 2004 WI 52, ¶ 79 n.29, 271 Wis. 2d 295, ¶ 79 n.29, 680 N.W.2d 666, ¶ 79 n.29 (noting that Wisconsin's nondelegation doctrine demands that there are “certain powers that are so fundamentally ‘legislative’ that the legislature may never transfer those powers”).

127. Advisory Opinion, *supra* note 121. Permitting a cabinet officer to transfer appropriation amounts between accounts is not unprecedented and in some instances is permitted by the Wisconsin Statutes. *See, e.g.*, WIS. STAT. §§ 16.518 (requiring the Department of Administration secretary to transfer certain excess funds from the general fund to the budget stabilization fund), 20.002(11) (requiring the secretary to calculate and reallocate certain funds from the budget stabilization fund to other accounts) (2003–2004). The attorney general dismissed these types of provisions as unhelpful because, unlike the partial-vetoed section 9255, such transfers are explicitly limited in amount and are temporary in duration. Advisory Opinion, *supra* note 121.

128. Advisory Opinion, *supra* note 121.

129. *Id.* (citing *Panzer*, 2004 WI 52, ¶ 79 n.29, 271 Wis. 2d 295, ¶ 79 n.29, 680 N.W.2d 666, ¶ 79 n.29; *Lounge Mgmt. v. Trenton*, 219 Wis. 2d 13, 23–24, 580 N.W.2d 156, 160–61 (1998); *State v. Block Iron & Supply Co.*, 183 Wis. 2d 357, 365, 515 N.W.2d 332, 334–35 (1994)).

130. *Id.*

131. *See id.*

shift appropriations in the same enrolled bill would, despite the broad language of section 9255, prevent the secretary from substantially altering appropriation amounts.<sup>132</sup> Any radical action, such as removing all funding from one agency and doubling the budget of another, would “frustrate the Legislature’s objectives.”<sup>133</sup> In other words, so long as any money transfer did not impair the receiving entity’s character or mission, the secretary’s actions would likely be lawful.

## 2. Reason for Concern

Assuming the attorney general’s opinion correctly concluded that the authority granted to the secretary under section 9255 would be limited by the principles of statutory construction and, as such, would be constitutionally valid, the language of section 9255 nonetheless raises new concerns regarding the use of the partial veto.

First, by giving the secretary new appropriation-shifting authority under section 9255, Governor Doyle removed legislative guidance and limitations on the distribution of government funds. While the secretary may not be able to shut down an agency, section 9255 apparently authorizes the secretary to siphon funding from various accounts and redirect that funding at the secretary’s discretion.<sup>134</sup> In essence, the provision strips appropriation authority, a core legislative function, from the legislature.

Second, should the secretary of administration attempt to exercise broad reallocation authority through section 9255 in a manner that troubles the legislature, a balancing test would have to be employed to determine whether the secretary has actually exceeded any conceptual limit on his or her authority. As discussed above, the principles of statutory construction that may presumably limit the secretary’s authority are neither specified in the legislative text nor in the state

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132. *Id.*

133. *Id.*

134. The governor’s veto message accompanying the 2005–2007 budget bill gives instructions on how the governor intends the secretary to lapse and transfer funding. Assemb. Journal, 97th Leg., Reg. Sess. 404 (Wis. 2005) (governor’s veto message). However, the governor’s veto message is not law. With regard to the vetoes to the 2005–2007 budget bill, Governor Doyle’s office stated that the secretary “will transfer funds to only carry out the governor’s wishes.” Steven Walters & Patrick Marley, *Doyle’s Veto Deemed Lawful: GOP Lawsuit Would Fail, Attorney General Says*, MILWAUKEE J. SENTINEL, Aug. 13, 2005, at 1A. Further, in response to criticism over the vetoes, then Department of Administration Secretary Mark Marotta stated he would “respect the legislature’s traditional oversight over state spending.” Walters, *supra* note 8.

constitution.<sup>135</sup> Resolving disputes over whether such authority was exceeded in a given instance would require case-by-case analyses in the courts.

Third, the simple yet expansive text remaining after the partial vetoes to section 9255 presents an easily adaptable blueprint for future governors to employ when considering provisions included in an appropriation bill. Regardless of how the secretary of administration utilizes the authority granted under section 9255, future governors will build on past precedent in order to gain more control over the budget process—at the heart of the matter is the fact that the governor brought the budget in line with his stated agenda.<sup>136</sup> In light of this precedent, failure to exercise the veto power to its full extent could be considered gubernatorial malpractice by a governor's supporters.<sup>137</sup> These concerns surrounding section 9255 justify reform of the partial veto authority in Wisconsin. However, drastic reform, while often called for, is not necessary or appropriate.

#### IV. DEBATING REFORM

##### *A. Past Criticisms and Considerations*

By its nature, the Wisconsin governor's partial veto authority challenges conventional ideas about executive and legislative functions. Unlike the federal system in which the president's legislative role consists mainly of proposing legislation, exerting political pressure on lawmakers, and reserving the ability to veto legislation in its entirety, a state governor's item- or partial-veto power inserts the governor into the logistics of the legislative process.<sup>138</sup> In Wisconsin, the current

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135. See *supra* Part III.B.

136. Remarking on Governor Doyle's controversial partial vetoes to the 2005–2007 budget bill, Mark Bugher, former secretary of administration under Governor Tommy Thompson stated, "I think most governors like the strong veto authority we have in Wisconsin. If a governor didn't go where Jim Doyle went, he definitely would have if he'd thought of it." Mayers, *supra* note 20, at 29.

137. Failure to utilize the full extent of the partial veto powers could also be viewed by the governor's opponents as ineptness. For example, dramatic differences between Governor Doyle's proposed 2005–2007 budget and the 2005–2007 budget bill passed by the legislature, especially in education funding, led to speculation that Governor Doyle may veto the entire budget. However, legislative leaders, including the governor's political opponents, dismissed the idea, acknowledging that the partial veto powers allow the governor to be creative in tailoring the budget to his agenda. Walters & Forster, *supra* note 105.

138. See Antony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 471–72 (1994).

executive-centered veto places a disproportionate amount of legislative authority with the governor. This arrangement has both positive and negative aspects.

Many commentators have called for changes to the current system in Wisconsin, correctly focusing on past excesses of the partial veto authority in light of a traditional, horizontal separation of powers concept.<sup>139</sup> The argument follows that the partial veto authority as currently exercised unnaturally intrudes on the legislature's role in formulating public policy. Indeed, at both the state and federal levels it is commonly accepted that "legislation [is] the domain of the legislature"<sup>140</sup> and that enacted laws are the result of negotiation and compromise.<sup>141</sup> In foul contrast, Wisconsin's partial veto authority allows the governor to create language never before approved by a majority of the legislature and places the burden on the legislature to disapprove of the governor's alterations by a supermajority veto override. In practice, the politics inherent in the budget process have distorted the legislature's veto-override power into a type of reverse filibuster<sup>142</sup> whereby a handful of governor-friendly legislators possess

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139. See, e.g., Wietzer, *supra* note 13, at 648; Editorial, *Governors Shouldn't Legislate*, MILWAUKEE J. SENTINEL, Oct. 29, 2005, at 12A; Editorial, *Restoring Balance of Power*, MILWAUKEE J. SENTINEL, Aug. 17, 2005, at 18A; Fred Wade, Op-Ed., *Here's Why Key Budget Vetoes by Doyle are Unconstitutional*, CAPITAL TIMES (Madison, Wis.), Aug. 8, 2005, at 9A; Walters, *supra* note 8. Even former governors have advocated for reform. Governor Patrick Lucey, who served from 1971 to 1977 and who is credited with ushering in the modern, expansive use of the partial veto, wrote in 1994 that some additional limitations on the governor's veto authority are warranted, but drastic reform is not necessary. Lucey, *supra* note 1, at 430. Similarly, Governor Anthony Earl, who served from 1983 to 1987 and pioneered the "pick-a-letter veto," stated his support for limiting the governor's partial veto powers in order to restore balance between legislative and executive branches of government. Earl, *supra* note 83, at 442.

140. Briffault, *supra* note 28, at 1174.

141. This point was highlighted during the U.S. Congress's debate over the federal "line-item veto" in 1992. U.S. Senator Robert Byrd (D-WV) argued against broad veto authority, noting that some state governors may delete by item veto conditions placed on an appropriation that were agreed to during legislative negotiations; without the negotiated conditions, the appropriation may never have received majority support in the legislature. See 138 Cong. Rec. 3, 3553 (1992).

142. A filibuster is a procedural tactic used in certain legislative bodies, including the U.S. Senate, through which members of the body prolong debate or otherwise prevent a vote on a particular matter. See BLACK'S LAW DICTIONARY 661 (8th ed. 2004). In the U.S. Senate, filibusters may be ended if a three-fifths majority of members vote to end debate on the matter—a "cloture" vote. *Id.* Commonly, "filibuster" is used to describe the ability of a minority of legislators to block the majority's attempt to pass on a matter before the body. In contrast, the Wisconsin system permits a minority of legislators to approve new law created by partial veto despite a majority's attempt to block such approval.

the power to ensure enactment of the new partial-veto-created law despite a majority's desire to block the law.

Depending on the amount of public support for the governor's agenda, the current arrangement may be the most advantageous. Indeed, it is difficult to argue against increasing public school funding to reduce class sizes and prevent the layoff of 4000 public school teachers, as was arguably accomplished by Governor Doyle's partial vetoes to the 2005–2007 budget bill.<sup>143</sup> Further, while the Wisconsin governor's partial veto power has expanded significantly over the past thirty years, the legislature's control over the state budget had not, until now, been critically damaged. Unless the governor vetoes an entire budget bill, the vast majority of the biennial budget is enacted in the same form as passed by the legislature, despite any partial vetoes.<sup>144</sup> Further, the 1990 amendment to article V, section 10 of the Wisconsin Constitution, preventing the governor from creating new words by vetoing individual letters included in the enrolled bill,<sup>145</sup> eliminated a veto technique that had significantly undermined legislative intent. The current executive-centered veto ultimately fulfills the purpose of its enactment: the governor is intricately involved in the appropriation process, and the legislature is checked in its omnibus budget practices.<sup>146</sup>

In addition, by affirming a broad partial veto authority, the Wisconsin Supreme Court arguably reduced judicial entanglement in partial-veto disputes between the executive and legislative branches.<sup>147</sup> Through the "complete and workable law test," the Wisconsin courts have opted for an "objective" view of the partial veto authority that, while highly deferential to the governor, allows for consistency and predictability.<sup>148</sup> Court-imposed limitations on a governor's partial veto authority, such as preventing the governor from affirmatively legislating, demand subjective interpretations by the governor as to whether a particular veto is appropriately "negative" in that it only blocks enactment of legislative language and does not alter the legislative

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143. Walters et al., *supra* note 3. However, the governor's transfer of funds to state public school aid came at the expense of other programs and services, including Medicaid and transportation projects. *Id.*

144. WIS. LEGISLATIVE FISCAL BUREAU, *supra* note 18, at 12.

145. WIS. CONST. art V, § 10(1)(c).

146. See *supra* Part II.A.

147. See Petrilla, *supra* note 138, at 496.

148. See *id.* at 496–97.



intent.<sup>149</sup> Similar constitutional limitations, such as limiting the partial veto to “lines” or “items,” tend to shift the balance of power entirely to the legislature by allowing the legislature to determine what constitutes a “line” or “item” in legislation.<sup>150</sup> If omnibus appropriation measures were drafted to obstruct application of a line- or item-veto, the purpose of a partial veto would be significantly frustrated.<sup>151</sup>

*B. Addressing New Concerns: The Need for a Targeted Constitutional Amendment*

Governor Doyle’s partial vetoes to section 9255 of the 2005–2007 budget bill, which granted appropriation power to the secretary of administration, could substantially usurp legislative control over state spending. Further, the case-by-case balancing test that would be necessary to determine the limits of any exercise of such a broad allocation of authority would negate benefits of the Wisconsin Supreme Court’s objective and deferential partial veto jurisprudence. Finally, given that future governors will be encouraged to build on this broad intrusion into the legislature’s domain, a narrow and limited amendment to article V, section 10 of the Wisconsin Constitution is appropriate.

Maintaining the benefits of the current executive-centered partial veto authority must be considered when looking at reform proposals. An appropriate amendment should maintain the current language of article V, section 10, and be targeted to prevent future governors from crafting by partial veto sweeping new law similar to section 9255 of the 2005–2007 budget bill. By maintaining the current language of article V, section 10, the Wisconsin Supreme Court’s interpretation of the partial veto powers remains applicable, limiting the need for judicial participation in future disputes over the governor’s partial vetoes.<sup>152</sup> The 1990 amendment provides a model approach. The 1990 amendment targeted the issue of most concern: it was narrowly limited

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149. See Briffault, *supra* note 28, at 1186; see also *supra* note 78 and accompanying text (discussing affirmative and negative application of the partial veto).

150. Petrilla, *supra* note 138, at 496.

151. See *id.* For example, if a veto authority allows for the vetoing of “lines,” the legislature may be able to determine the size and extent of a “line.” If the line is large and includes multiple topics, the governor would not be able to pass individually on each topic. See also *supra* text accompanying notes 28–29, 35–41 (discussing motivations for enacting a partial veto authority).

152. See Briffault, *supra* note 28, at 1197.

to abolish the pick-a-letter veto.<sup>153</sup> While not intended to eliminate all controversial partial-veto practices, the amendment did end one offensive practice while maintaining a strong partial veto power. The amendment did not insert a subjective element into the veto authority, such as limiting the veto powers to “negative” applications only.<sup>154</sup> Therefore, application and validity of the partial veto remains fairly predictable.

To effectively address the concerns raised by Governor Doyle’s partial vetoes to section 9255 while preserving an effective partial veto authority, an amendment limiting the governor’s ability to compose sentences by combining words from two or more sentences should be considered.<sup>155</sup> While attempts to “veto proof” legislation may raise questions about what is a “sentence,” any judicial interpretation of the word “sentence” would likely be definitive. Another approach, amending article V, section 10, to limit partial vetoes to “individual components capable of separate enactment,” would apply a double-edge to the “complete and workable law” test.<sup>156</sup> Such an amendment would require not only the text remaining after partial veto to be “complete and workable law” but would require the portions vetoed to be “complete and workable law.” It would allow the governor to “pass . . .

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153. As noted in Part III, that amendment was adopted in 1990 following the Wisconsin Supreme Court’s approval of the pick-a-letter veto in *Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988). The amendment added article V, section 10(1)(c), which prohibits the governor from creating new words by vetoing individual letters from words included in the legislation.

154. Briffault, *supra* note 28, at 1197.

155. See legislation listed *supra* note 7. Prohibiting the governor from creating new sentences by connecting previously unassociated words has been considered by the legislature, see e.g., Assemb. J. Res. 1, 98th Leg., Reg. Sess. (Wis. 2007); Enrolled J. Res. 46, 2005 Wis. Sess. Laws 1, and in fact, Governor Doyle supported such an amendment in 1992 when he was serving as state attorney general, Steven Walters, *Amendment Would Limit Veto Powers*, MILWAUKEE J. SENTINEL, Aug. 2, 2005, at 3B. The proposed amendment was 1991 Wisconsin Assembly Joint Resolution 78. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 19. Regarding his creative and controversial use of the partial veto in contrast to his past support for limiting the governor’s partial veto powers, Governor Doyle commented, “Let’s just say I see the world differently from the position I’m in right now.” Mayers, *supra* note 20, at 27.

156. Justice Hansen, dissenting in *Klecza v. Conta*, argued in support of this restriction. 82 Wis. 2d 679, 726, 264 N.W.2d 539, 560 (1978) (Hansen, J., concurring in part, dissenting in part). Legislation was introduced in the 1979 Wisconsin legislature embodying Justice Hansen’s proposed restriction. S.J. Res. 7, 84th. Leg., Reg. Sess. (Wis. 1979). The amendment passed both the senate and assembly in 1979, but on second consideration in 1981, the amendment failed to pass the assembly. WIS. LEGISLATIVE REFERENCE BUREAU, *supra* note 8, at 18–19.

on each separable piece of legislation on its own merits”<sup>157</sup> while preventing the governor from “reduc[ing] a bill to its single phrases, words, letters, digits and punctuation marks.”<sup>158</sup>

## V. CONCLUSION

Wisconsin’s executive-centered partial veto casts the governor as the chief legislator, able to employ a heavy hand in the budget process and able to create law in violation of traditional concepts of separation of power. Despite such broad authority, the legislature’s role in developing and approving the budget has not been critically damaged. However, the partial vetoes applied to section 9255 of the 2005–2007 budget bill, granting appropriation authority to the secretary of administration, removed legislative involvement in the allocation of certain state resources to a potentially alarming degree. In light of constant gubernatorial attempts to gain more control over the budget, the legislature’s role in the appropriation process should be aggressively guarded. Delegation of that control, even in the interests of “flexibility,” removes a check vital to the operation of state government. Amending article V, section 10 of the Wisconsin Constitution is necessary to protect the legislature’s role in the appropriation process. Any constitutional amendment, however, should be carefully limited to prevent future usurpation of the legislature’s appropriation function while maintaining predictability in the future application of the partial veto.

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157. *Klecza*, 82 Wis. 2d at 725, 264 N.W.2d at 560 (quoting *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 315, 260 N.W. 486, 492 (1935) (emphasis removed)).

158. *Id.* at 726, 264 N.W.2d at 560.